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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/564,805	05/17/2006	Marie-Cristine Secretin	112701-701	3416

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EXAMINER
SMITH, PRESTON

ART UNIT	PAPER NUMBER
1794	

NOTIFICATION DATE	DELIVERY MODE
11/19/2009	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

Advisory Action Before the Filing of an Appeal Brief	**Application No.** 10/564,805	**Applicant(s)** SECRETIN, MARIE-CRISTINE	
	Examiner PRESTON SMITH	**Art Unit** 1794	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 09 November 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
   a) ☒ The period for reply expires *5* months from the mailing date of the final rejection.
   b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

   Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
   (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
   (b) ☐ They raise the issue of new matter (see NOTE below);
   (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
   (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
   The status of the claim(s) is (or will be) as follows:
   Claim(s) allowed: _____.
   Claim(s) objected to: _____.
   Claim(s) rejected: *1 and 5-21*.
   Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☒ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

/Drew E Becker/
Primary Examiner, Art Unit 1794

Continuation of 11. does NOT place the application in condition for allowance because: Applicant argues that Carlson does not teach or mention any percentages or the requirement of specific percentages of ARA and DHA in the total fatty acids in the lipid source as is required, in part by the present claims (see second paragraph of page 4). Carlson teaches a "formula" (infant, see column 3, line 47 and line 65) comprising protein, carbohydrates, and lipids (column 11, line 27). As seen in table IV (the table is based on the lipids), column 13, lines 5-31, arachidonic acid and docosahexaenoic acid may be present in 0.41 weight % (22 mg) and 0.14 weight % (7 mg) respectively (column 13, lines 36-41). Additionally, the amounts of arachidonic acid may range from 1.0-60 mg (column 3, lines 66-67) and the amounts of docosahexaenoic acid may range from 0.25-35 mg (column 4, line 1) in the formula. Although Carlson fails to explicitly teach arachidonic acid and docosahexaenoic acid both being present in the formula wherein the docosahexaenoic acid amount is 0.2-0.5%, Carlson does teach that the amount of docosahexaenoic acid may range from 0.25 - 35 mg as discussed previously (the 0.14% discussed previously pertains to 7 mg being present.) In light of these teachings, one of ordinary skill in the art would have found it obvious to slightly increase the docosahexaenoic acid content to 7 mg (which results in 0.14%) to a slightly higher amount in order to boost the brain health boosting properties (produce known effects) of the formula (see docosahexaenoic acid NPL). Also, in light of the teachings discussed previously, the claimed range would have been discoverable by routine experimentation by one of ordinary skill in the art seeking to boost the brain health enhancing properties of the "formula".

Applicant also argues that Carlson fails to teach promoting the immune system (see page 4, 2nd paragraph). The formula of the composite invention would "strengthen" the immune defenses and reduce morbidity in infants since it would it would reduce the risk of conditions such as necrotizing enterocolitis (an infant infection).

Applicant also argues that Halpin-Donhnalek and Kraty fail to remedy the deficiencies of Carlson (see page 4, 3rd paragraph). Halpin-Dohnalek teaches probiotics such as lactobacillus (column 3, lines 44-48. the formula may additionally comprise bifidobacterium also as seen in column 3, lines 35-36) for use in an infant formula (column 4, lines 23-25). Carlson doesn't teach probiotics and thus Halpin-Dohnalek was considered to remedy this lacking feature. Kratky teaches sweet whey proteins that have been modified by the removal of CGMP from the protein (column 2, lines 36-37). Carlson doesn't teach sweet whey proteins and thus Kratky was considered to remedy this lacking feature.

Applicant also argues that the references can not be combined to overcome the deficiencies of Carlson because each of the references is geared towards combating different problems (see pages 5, 2nd paragraph). In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See In re Keller, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); In re Merck & Co., 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Carlson was simply used to teach sweet whey protein.

Applicant also argues that Haplin-Dohnalek is drawn to treatment of older children(see page 5, 4th paragraph) however Haplin Dohnalek states that the invention can be used with infants (abstract). Applicant also argues that probiotics Lactobacillus reuteri and Lactobacillus acidophilus are not recommended by the WHO for consumption by children under the age of 3. The probiotics of Haplin Dohnalek can be used in a nutritionally complete infant formula and thus this argument is not sufficient to overcome the rejection (see abstract of Haplin-Dohnalek).

Applicant argues that Kankaanpaa (reference provided by applicant) teaches that one of ordinary skill would have been deterred from combining probiotics and PUFA's (see page 5, last paragraph). The Kankaanpa reference does not appear to establish that combining probiotics with PUFA's would be disadvantageous in the references cited by examiner.

In response to applicant's arguments against the references individually (see page 6, all of the arguments. The references were only used to teach concepts in the primary reference that were lacking), one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See In re Keller, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); In re Merck & Co., 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

\In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning (see page 7, 3rd paragraph), it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See In re McLaughlin, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

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